COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM 35 CENTS PER NUMBER

NOVEMBER, NINETEEN HUNDRED AND TWELVE.

NOTES.

BREAKING DESCENT BY ALIENATION.—The common law of descent is unique in that it looks to the source of the intestate's property and favors the blood descendants of the first purchaser; under other legal systems the descent depends entirely upon proximity of relationship to the intestate.[1] The explanation is historical. The feudal lord, relying upon the superior personal qualities of his vassal, made no absolute feoffment but limited the grant to the feoffee and the heirs of his body, thus indicating the succession;[2] but apart from that there is a claim of justice in distributing property not among the heirs of him who fortunately inherited it, but among the heirs of him by whose industry the property was first brought into the line of inheritance. The civil law in an analogous situation distinguishes between onerous and lucrative title, and where, for example, a widow remarries, she forfeits property held by her in the former mode to the children of the first marriage.[3] This justification does not, however, universally

[1] Cutter *v.* Waddingham (1855) 22 Mo. 206, 259.

[2] 2 Bl. Comm. 221.

[3] Cutter *v.* Waddingham *supra*, 260; *cf.* Scott *v.* Ward (1859) 13 Cal. 459.

apply, for the term purchase technically comprehends every mode of acquisition except descent,[4] including gift and devise.[5] Finally, the function of the law of descent is to afford a legal substitute for a will; it should, therefore, dispose of the intestate's property as it might be presumed that an unbiased testator would have done,[6] and upon such a basis the identity of the first purchaser would commonly be ignored. This principle, which universally controls the distribution of personalty,[7] underlies the bulk of American legislation governing the succession to land; but for many purposes, particularly where rival claims of the half and the whole blood are concerned, it is important to determine whether the descent which would otherwise control the devolution of estates has been broken by the intestate's management of the title.

Heirs of the first purchaser may be said to have a sort of expectancy in the ancestral property of which a person is seised, in that upon his death without issue they are preferred to his collateral heirs of a certain degree of remoteness; but just as no prospective heir has a vested right of inheritance, so no true heir of the first purchaser of property has a vested right to the preservation of its ancestral character. One may disinherit his prospective heirs of the property which he may possess at death by devising it; but one without issue who holds ancestral property has a power of a somewhat different nature; he may admit certain classes to the inheritance and reject others and yet retain the property; he may within certain limits, purposely or not, direct the devolution of the property of which he shall at death stand seised and yet die intestate, by changing his estate from one by descent to one by purchase. This happens irrevocably upon alienation, even though he later buys the same estate,[8] or takes other land in exchange,[9] or re-invests the proceeds of the sale,[10] for no trust is impressed upon the fund. On principle the same result must follow when a conveyance is made on trust to reconvey. The title has gone out and the grantor holds merely an equitable interest, which, it is true, would descend in the same manner as a legal estate,[11] but immediately upon reconveyance the equitable title becomes merged in the legal and the

[4] 2 Bl. Comm. 241.

[5] The devise to an heir of the very estate that he would take by inheritance does not break the descent since the estate passes under the worthier title. Philips *v.* Dashiell (Md. 1804) 1 H. & J. 478; *cf.* Gilpin *v.* Hollingsworth (1852) 3 Md. 190; see Biederman *v.* Seymour (1841) 3 Beav. 367, 370. In England this result is rendered impossible by a statute specifically effectuating the devise. Owen *v.* Gibbons, L. R. [1902] 1 Ch. 636.

[6] See Edwards *v.* Freeman (1727) 2 P. Wms. 436, 440; Garland *v.* Harrison (Va. 1837) 8 Leigh 368, 371; 1 Woerner, Amer. Law of Adm. (2nd ed.) § 9.

[7] Howe, Studies in the Civil Law, 233.

[8] 1 Co. Litt. 12 *b;* but see Hargrave & Butler, Notes on Coke 12 *b.*

[9] Brower *v.* Hunt (1869) 18 Oh. St. 311; Armington *v.* Armington (1867) 28 Ind. 74; *cf.* Carter *v.* Day (1898) 59 Oh. St. 96.

[10] Watson *v.* Thompson (1879) 12 R. I. 466; McCammon *v.* Cooper (1903) 69 Oh. St. 366.

[11] Abbott *v.* Burton (1709) 2 Salk. 590; Nanson *v.* Barnes (1869) L. R. 7 Eq. *250.

grantor consequently holds a new estate by purchase.[12] Nor does a positive intention to break the descent affect this result,[13] for at most the transfer is an exercise of the undoubted right to disinherit. Indeed, in the recent case of *Dudrow* v. *King* (Md. 1912) 83 Atl. 34, the element of intention was deemed controlling. The intestate aliened for a collateral purpose upon trust to reconvey, expressing his intention not to change the succession and the court held, in view of the grantor's desire, that the descent had not been broken by the excursion of the legal title. This decision shows an encouraging tendency to disregard a strictly technical rule of property in order to effectuate the intention of the intestate and to allow the fullest freedom in the management of the title.

CLOG ON THE RIGHT TO REDEEM.—The court of chancery, asserting a paternal solicitude for the embarrassed borrower,[1] has imposed upon every transaction in which security is given for the payment of a debt, a continuing right to redeem upon payment of principal, interest and costs.[2] This right has become a necessary incident of the mortgage relationship,[3] so that those who enter into that relationship can no more bargain it away[4] than men who contract could agree to dispense with a consideration. There can be no valid promise that the *res* shall be indefeasibly the property of the mortgagee, either if the mortgagor fail to pay on the law day[5] or if he fail to pay within an agreed time thereafter.[6] The first promise would kill and the second would cripple the equity of redemption in the very instrument which gave it birth.[7] Whatever one may think of this bold interference of equity with the legal consequences of the mortgagor's deliberate deed,[8] it is clear that if equity was justified in

[12]Holme *v.* Shinn (1901) 62 N. J. Eq. 1; but see Hargrave & Butler *supra.* The conclusion would seem to be supported further by the well-settled proposition that when one inherits the equitable estate and subsequently buys in the legal title he holds by purchase. Goodright *v.* Wells (1781) Doug. 771; Selby *v.* Alston (1797) 3 Ves. Jr. 338; Olmstead *v.* Douglass (1898) 16 Oh. Cir. Ct. 171; *cf.* Doe d. Harmon *v.* Morgan (1797) 7 D. & E. 103; *contra,* Frick *v.* Laughead (1902) 203 Pa. St. 168.

[13]Nesbitt *v.* Trindle (1878) 64 Ind. 183; see Kihlken *v.* Kihlken (1898) 59 Oh. St. 106.

[1]Vernon *v.* Bethell (1761) 2 Eden 113; 2 Story, Eq. Jur. (13th ed.) § 1012.

[2]Jennings *v.* Ward (1705) 2 Vern. 520.

[3]Henry *v.* Davis (1823) 7 Johns. Ch. 40.

[4]Samuel *v.* Jarrah Corp. L. R. [1904] A. C. 323.

[5]Jackson *v.* Lynch (1889) 129 Ill. 72; Rogan *v.* Walker (1853) 1 Wis. 527.

[6]Heirs of Samuel Stover *v.* Heirs of William Bounds (1853) 1 Oh. St. 107; see Toomes *v.* Conset (1745) 3 Atk. 261.

[7]It was an equally invalid restriction to limit the right to redeem to the mortgagor himself, Salt *v.* Marquess of Northampton, L. R. [1892] A. C. 1, or to a particular class of persons, as heirs of the mortgagor's body. Howard *v.* Harris (1683) 1 Vern. 190. If, however, the court sees a proper motive for such restriction, it will be supported. Bonham *v.* Newcomb (1683) 1 Vern. 232.

[8]See Salt *v.* Marquess of Northampton *supra;* Samuel *v.* Jarrah Corp. *supra; cf.* 4 Kent, Comm. (4th ed.) 158.